SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 700

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE,

Respondents

No. 703

FEDERAL MARITIME BOARD,

Petitioner,

vs.

UNITED STATES OF AMERICA AND ISBRANDTSEN COMPANY, INC.,

Respondents

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Pacific Westbound Conference respectfully moves for leave to file a brief amicus curiae in the matter of the petitions for writ of certiorari filed by Federal Maritime Board and Japan-Atlantic and Gulf Freight Conference. Consent to the filing of such a brief has been given by petitioners Federal Maritime Board and Japan-Atlantic and Gulf Freight Conference and by respondents United

States of America and Ezra Taft Benson, Secretary of Agriculture, but has been refused by respondent Isbrandtsen Company, Inc.

While under this Court's Rule 27-b, motions such as this are not favored, we believe there exist strong reasons to support the granting of this motion. These reasons are that such brief will bring to the Court's attention the decision of the Supreme Court of Oregon in the case of *Pacific Westbound Conference* vs. *Leval & Co., Inc.*, 58 Oregon Supreme Court Advance Sheets 677, —P. 2d —, which was decided April 21, 1954, which was after the petition for writ of certiorari in *Japan-Atlantic and Gulf Freight Conference* vs. *United States of America, et al.*, was filed, and the widespread ill effects of the decision sought to be reviewed herein upon steamship conferences such as this applicant, Pacific Westbound Conference.

Applicant's Interest

Applicant will file a petition for writ of certiorari to the Supreme Court of Oregon in the case of *Pacific Westbound Conference* vs. *Leval & Co., Inc.* A petition for re-hearing in that case was denied May 19, 1954. This petition for a writ of certiorari will present the same important question presented by the petitions of the Federal Maritime Board and Japan-Atlantic and Gulf Freight Conference herein, namely, whether Section 15 of the Shipping Act, 1916, requires the Board to give prior separate approval to the use of contract/non-contract rates by common carriers in foreign trade whose conference agreements approved by the Board, provide for and contemplate the collective fixing of lawful rates.

No other question will be presented by the petition to be filed by applicant, as the decision of the Oregon Supreme Court was decided upon that single issue. Applicant's petition for a writ of certiorari is not yet ready to be filed.

It will be filed in due time to permit the court to hear applicant's case without delay at the same time as the instant case.

Reasons in Support of Motion

Applicant, like petitioner Japan-Atlantic and Gulf Freight Conference, is an association of steamship carriers engaged in foreign commerce. For many years, applicant has used contract/non-contract rates. Upon the basis of the principle adopted by the United States Court of Appeals for the District of Columbia Circuit herein and upon authority of that case applicant's system of contract/non-contract rates has been held illegal by the Oregon Court in *Pacific Westbound Conference* v. *Leval & Co., Inc.*, cited above.

The decision of the United States Court of Appeals for the District of Columbia Circuit will have widespread harmful effect. It rejects a long-established administrative practice which we believe to be both reasonable and necessary to the steamship conferences and to the efficient action of the Federal Maritime Board.

The petitions present a question of interpretation of Section 15 of the Shipping Act, 1916. The long-existing interpretation of Section 15 by the Shipping Board and its successors has been that organic conference agreements are approved by the Board, but that action pursuant to the basic organic conference agreement, including the introduction of common contract/non-contract rates did not require prior approval by the Board under Section 15, if such action was intra vires the authority granted the conference under its approved conference agreement. Since its organization and the approval of its conference agreement in 1923, applicant, Pacific Westbound Conference, has kept the Board informed of its actions under the conference agreement by submitting to the Board, pursuant to regulation, copies of its minutes, all its rates, rate changes, rules adopted, and forms of

agreements with its shippers. The changes in rates submitted by this conference have been many and continuous. The Board has reviewed this data and frequently, through its staff, has requested action of the conference, such as changing provisions of its contracts with shippers and provisions of its tariff regulations.

As early as 1927, in *Ex Parte 4,* a Section 15 inquiry, 1 U.S.S.B. 121, the predecessor of the Federal Maritime Board, United States Shipping Board, construed Section 15 as not requiring specific approval by the Board of routine operations such as rates, rate changes and other day-to-day transactions by the carriers under conference agreements, as this would be impracticable and would result in delays and inconvenience to both carriers and shippers. It would have been impracticable and contrary to the legislative intent for the Board to have adopted a scheme of administrative approval of each rate filed and each action taken by the conferences in operating from day to day under their organic agreements. The contract rate systems were in general use and were well known to the successive shipping boards.

Many freight conferences, like applicant, have long been operating under contract/non-contract rate tariffs without specific prior approval by the Board of such rates or of any of the multitude of changes of such rates which occur regularly in the operation of the conference under its organic agreement. Applicant's agreement was approved by the Shipping Board in 1923.

The decision in the court below means, not only that this conference has been acting illegally, although in full conformity with the established administrative procedure and with the knowledge of the Board, but it also means that the conference and other conferences in foreign trade will have to accept an impracticable procedure for obtaining ap-

provals which will constitute a serious obstacle to carrying on their functions. It is essential that steamship conferences institute rates and rate changes promptly to meet competitive and economic changes in their trades. The delay incident to a procedure of formal approval by the Board administering the Shipping Act would result in injury to the conferences, as experience in the past as to delays has many times shown.

It is respectfully requested, on the above grounds, that this application for leave to file a brief as amicus curiae be granted.

Respectfully submitted,

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BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONS OF FEDERAL MARITIME BOARD AND JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE

The decision of the United States Court of Appeals for the District of Columbia is of such widespread importance to the foreign commerce of the United States and to the administration and construction of the Shipping Act, 1916, as to warrant its review by this Court.

In *Pacific Westbound Conference et al.* v. *Leval & Co.*, —— Oregon Dec. ——, —, Pac. 2d —, 58 Oregon Supreme Court Advance Sheets p. 677, decided April 22, 1954, a decision of the court below in favor of defendant based upon alleged invalidity of the liquidated damage clause in the Conference's contract with a shipper was affirmed upon appeal upon the sole ground that the conference's dual rate contract required formal approval by the Federal Maritime Board. A copy of the Court's opinion is included herein as Appendix "A". The Court relied upon the decision in the United States Court of Appeals for the District of Columbia, as to which petitions for writs of certiorari have been filed herein by the Federal Maritime Board and by Japan-Atlantic and Gulf Freight Conference.

The latter case is a reversal of a well-established and long-standing construction given to Section 15 of the Shipping Act, 1916, by the Board and its predecessors. It will require the Board to make radical changes in the methods used by the Board to administer the Act. The decision will have adverse effects upon conferences of carriers operating in foreign trade of the United States.

Under Section 15 of the Shipping Act, 1916 (46 U. S. C. Sec. 814), "every" rate-fixing agreement between common carriers by water in the foreign commerce of the United States must be filed with the Board for approval.

While, strictly speaking, every determination of a rate by a conference is an agreement between the member lines, the Board, in *Ex Parte 4,* Section 15 inquiry, 1 U. S. S. B. 121 (1927), conducted a formal rule-making proceeding and concluded that Section 15 did not call for the filing and approval of *every* concerted action by carriers, but only those "agreements whereby the carriers propose to be governed in their conference activities . . . . Such agreements are to be distinguished from the routine of conference activities." (emphasis supplied)

Under Section 5a (2) of the Interstate Commerce Act (49 USC 5b) and Section 4b of the Civil Aeronautics Act (49 USC 492-494) both of which were modeled on Section 15 of the Shipping Act, specific rates are not approved and only the basic enabling agreement authorizing the use of such rates requires approval (Senate Report No. 44, 80th Congress accompanying S. 110, pages 13-14).

This administrative rule requiring the approval of organic agreements of conferences, but not every action taken pursuant to such agreements, has afforded a workable arrangement for conference rate regulation. The practice has been followed for many years by the Board. Rates and tariff rules adopted by the conferences are required to meet the standards provided for in sections of the Shipping Act, and that Act provides for complaints by the Board or by third parties. Accordingly, there is ample protection for injured persons if a conference establishes a rate or rates which violate the terms of the Act.

Pacific Westbound Conference supports petitioners herein because it believes that the forced withdrawal of the Board's long-established practice referred to above will necessarily have a profound effect upon the daily activities of conferences which have been governed by, and have relied upon, that practice.

We believe that the administrative practice of the Board has been sound and practical. A statutory construction followed for so long a time by the administrative agency charged with the administration of the Shipping Act is entitled to great weight. See *Hirshberg* v. *Cooke*, 336 U. S. 210 (1949).

Whether a given conference activity constitutes an "agreement" within the meaning of Section 15 is within the Board's primary exclusive jurisdiction. *Far East Conference* v. *U. S.*, 342 U. S. 570 (1952); *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 486 (1932).

An administrative agency of the Government should have sufficiently broad authority to carry out effectively the work assigned to it by statute.

Serious effects will necessarily follow if the opinion below is to be controlling. A large number of the conferences of lines operating regular or berth services from United States ports to all parts of the world presently employ contract/non-contract rates. The decision below means that all of the carriers in these conferences, relying upon long-established administrative practice, have been and are acting illegally. This may result in the members of the conference being faced with a multitude of suits for damages and reparations and to actions for penalties under Section 15, since although the Board was aware of such practices, they were technically violative of the Shipping Act, inasmuch as they had not been specifically approved.

Conclusion

For the foregoing reasons, it is respectfully submitted that the petitions of Federal Maritime Board and Japan-Atlantic and Gulf Freight Conference should be granted.

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF OREGON

Received Apr. 22, 1954, Grosscup, Ambler, Stephan & Miller.

Pacific Westbound Conference: AMERICAN HAWAIIAN STEAMSHIP COMPANY, AMERICAN MAIL LINE, LTD., AMERICAN PRESIDENT LINES, LTD., BANK LINE, LTD., BLUE FUNNEL LINE, OCEAN STEAM SHIP CO., LTD., CHINA MUTUAL STEAM NAVIGATION CO., LTD., NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ "OCEAN", CANADIAN PACIFIC STEAMSHIPS, LTD., DE LA RAMA LINES, THE DE LA RAMA STEAMSHIP CO., INC., SWEDISH EAST ASIATIC CO., LTD., EAST ASIATIC CO., LTD., ELLERMAN & BUCKNALL STEAMSHIP CO., LTD., AMERICAN & MANCHURIAN LINE, FERN LINE, FEARNLEY & EGER and A. F. KLAVENESS & CO. A/S, ISTHMIAN STEAMSHIP COMPANY, IVARAN LINES, FAR EAST SERVICE, JAVA PACIFIC LINE, N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND", KONINKLIIKE ROTTERDAMASCHE LLOYD, N. V.; KLAVENESS LINE, A. F. KLAVENESS & CO., A/S, LANCASHIRE SHIPPING COMPANY LIMITED (CASTLE LINE), A. P. MOLLER-MAERSK LINE, PACIFIC FAR EAST LINE, INC., PACIFIC ORIENT EXPRESS LINE, DITLEY-SIMONSEN LINES, TRANSATLANTIC STEAMSHIP CO., LTD., PACIFIC TRANSPORT LINES, INC., PRINCE LINE, LTD., SALEN-SKAUGEN LINE, REDERI A.-B. PULP, REDERI A.-B. JAMAICA, D/S A/S EIKLAND, SALAMIS A/S, SILVER LINE, LTD., STATES MARINE CORPORATION, STATES MARINE CORPORATION OF DELAWARE, STATES STEAMSHIP COMPANY, SUDDEN & CHRISTENSON, INC., WESTERN CANADA STEAMSHIP COMPANY, LTD., WILH. WILHELMSEN, *Appellants*,

vs.

LEVAL & CO., INC., a New York Corporation, *Respondent and Cross-appellant*

* * * * * * *

Appeal from Circuit Court, Multnomah County.
Martin W. Hawkins, Judge.
Argued and submitted March 17, 1954.

Albert E. Stephan, of Seattle, Washington, argued the cause for appellants. With him on the briefs was Allan Hart, of Portland.

James P. Cronan, Jr., of Portland, argued the cause for respondent and cross-appellant. With him on the briefs were Donald A. Schafer and Schafer, Holbrook & Cronan, of Portland.

Before Latourette, Chief Justice, and Warner, Possman, Lusk, Brand and Perry, Justices.

PERRY, *J.* Affirmed.

Filed Apr. 21, 1954.

F. M. SERCOMBE,
Clerk,
(Supreme Court of Oregon),
By —— ——,
Deputy.

PERRY, *J.:*

The plaintiffs are a voluntary association of numerous common carrier steamship companies duly organized under the authority of Title 46, USCA, cited as the "Shipping Act of 1916", and operating under the name of Pacific Westbound Conference. The members of the association operate ships in regular service, carrying cargo west-bound from ports on the Pacific coast of the United States and Canada to ports in the far East.

The defendant, a corporation with its principal office in New York City, New York, maintaining a branch office in Portland, Oregon, is an extensive shipper of merchandise and other commodities by steamship.

In October, 1946, the plaintiffs entered into a contract with the defendant (the contract being designated as "Pacific Westbound Conference General Commodity Contract Rate Agreement") which provided that the defendant would consign all of its cargo shipments from Pacific coast ports via ships of carriers belonging to the Pacific Westbound Conference, and in consideration of the exclusive use of Conference ships, the defendant was to receive a lower tariff

rate than that of a shipper who did not enter into such an exclusive contract of carriage. This exclusive contract of carriage, however, was not limited solely to the defendant, but was open to anyone who desired to enter into such an agreement.

The contract between the plaintiffs and the defendant also provided that should the defendant ship cargo with a carrier who was not a member of the Conference, then the shipper had breached the contract and would be liable in damages in a sum equal to the contract tariff of the shipment, this amount being agreed to as liquidated damages in lieu of actual damages because of the impossibility or impracticability of determining the actual damage suffered by the plaintiffs.

The original contract as entered into was from time to time amended as to rates and terms by mutual agreement of the parties, the last revision and acceptance being on May 15, 1949.

In September, 1949, the defendant in violation of the contract agreement made a shipment from Astoria using a foreign flag vessel which was not a member of the Conference, and this action was brought by the plaintiffs for damages suffered by breach of the contract. The matter was tried to the circuit court without a jury, the trial court finding that there had been a breach of the contract, but denying the plaintiffs a recovery. Subsequent to a determination by the trial court that the plaintiffs could not recover liquidated damages as provided in the contract, the court permitted the cause to be reopened and the court determined the actual amount of damages, but still denied recovery. The plaintiffs have appealed from the adverse judgment of the court, and the defendant has cross-appealed, claiming that the trial court was in error in permitting the plaintiffs to reopen the case for the purpose of proving their actual damages.

The serious question that confronts this court is whether or not it is necessary that the conference agreement and its amendments as entered into between the steamship companies in order to give validity to the contract of carriage as sued upon must set forth the proposed dual contract rate program and be approved by the United States Maritime

Commission prior to the execution of the General Commodity Contract Rate Agreement, or, in lieu thereof, that the General Commodity Contract Rate Agreement between these parties be first formally approved by the United States Maritime Commission.

The answer to this question must be determined from the construction of Title 46, USCA, and particularly § 814 thereof, which reads as follows:

> "Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.
>
> "The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.
>
> "Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any

agreement or any portion thereof disapproved by the commission.

"All agreements, modifications, or cancellations, made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto."

The memorandum of agreement which bound the various carriers together into the Pacific Westbound Conference was made and entered into on the 8th day of January, 1923, and duly approved by the Maritime Board (now existing as the United States Maritime Commission) on June 26, 1923. This agreement has from time to time been amended by the members of the Conference and the amendments duly approved by the United States Maritime Commission. The members of the Westbound Conference provide by their contract that their association together "is for the regulation of traffic and not of operation and only covers rates, tariffs, brokerage and matters directly relating thereto", and the parties to the Conference "agree and stipulate with each other that they will be bound by the agreement of two-thirds of their number * * * as to any tariff, freight rate, charge, brokerage, traffic regulation and/or, any other matter within the scope of this agreement with the same force and effect as if expressly made a part hereof." It is, therefore, readily seen that the action of two-thirds of the members of the Conference in determining tariff rates and approving lower rates to exclusive users of Conference lines effects a change or modification in the agreement of the parties binding upon all members of the Conference.

Section 814 of Title 46, USCA, hereinbefore set out, provides that the term "agreement" as used in the act includes "understandings" and "other arrangements", and that all agreements, modifications or cancellations made subsequent

to the organization of the Commission under the act *shall be lawful only when approved by the Commission and that it shall be unlawful, directly or indirectly, to carry out any agreement or understanding or practice until approved.*

Thus an agreement of dual rates as set forth in the contract sued upon is subject to the control of the United States Maritime Commission. The reason for this is readily understandable because the shipping act of 1916 permits the combining of a group of carriers and action by them that would be unlawful under §§ 1-11 and 15 of Title 15, UCLA, and the amendments and acts supplementary thereto, generally referred to as the Sherman Antitrust Act and the Clayton Act, and while, because of necessity in connection with the maintenance of adequate sea transportation for this country, Congress felt that the steamship companies could combine and operate to some extent in restraint of trade and carry on a monopolistic practice, for the protection of the public interest this was to be permitted only under due and proper supervision. The shipping act provides for prior approval.

We are impressed with the reasoning of the United States Court of Appeals for the District of Columbia Circuit in the case of Isbrandtsen Company, Inc., v. United States of America and Federal Maritime Board, et al., — F.2d —, (decided January 21, 1954), wherein it is stated:

> "* * * This pre-approval illegality stems from the fact that the Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the anti-trust laws. The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute. But until this is done, the agreement is subject to the operation of the anti-trust laws, under which price fixing agreements are illegal per se."

The Conference agreement and its amendments and changes as approved by the Maritime Commission does not provide for a reduced rate to shippers exclusively using

ships of the Pacific Westbound Conference, and it is admitted that the contract of the parties litigant although filed was never approved. We are of the opinion that there must first be formal approval of this practice as to this particular Conference by the United States Maritime Commission before such an agreement is enforceable between the Conference and a shipper.

The pleadings and the evidence failing to show the necessary approval by the United States Maritime Commission, the circuit court was correct in its result.

Since we view the contract as being "unlawful" and, therefore, unenforceable before approval by the United States Maritime Commission, it is unnecessary to consider the other issues of error claimed by the parties.

The judgment of the trial court is affirmed.